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Taking Aim: The Impetus Driving Suits Against Gun Manufacturers

Mark Barnes

I want to thank Pepperdine University School of Law for holding this symposium. I think the gun issue is a very, very important one that does need to be addressed, although as Denise pointed out,¹ she and I will differ greatly where it ought to be addressed and where it has been addressed. I want to compliment Denise on her presentation and also distinguish those remarks from the comments I am going to make about some members of the plaintiff's bar because they do not apply to her. Lisa Barnes started the litigation, and Denise came in to try a case and obviously did a very professional job in doing that. But some other members of the plaintiff's bar that I am going to discuss today have different motivations, and I think that those need to be brought to the attention of the public and everyone who is interested in this issue.

First of all, we could probably spend until dinnertime talking about everything going on in *Hamilton v. Accu-tek*,² and if we did, we would miss what is really going on with the municipality suits and how we even got here to begin with. I think that would be a mistake because how we got here is just as important as what is going on at the present time. However, I do want to say one thing about the *Hamilton* case, and maybe later we can explore this further. I would like to read to you the law of New York, which, I think, is going to be determinative of what eventually happens with this case. This is from *McCarthy v. Olin*,³

Because we hold that the Black Talon bullets were not defectively designed, we must affirm the dismissal of appellant's strict liability claims. We also hold that Olin was under no legal duty to prevent criminal misuse of its product and therefore affirm the dismissal of the negligence claims. Although appellants are the victims of a horrible tragedy, under New York law, they have failed to state a cause of action upon which relief can be granted - *in sum*, *New York law does not afford them a*

1. For the transcript of Denise Dunleavy's presentation, see 27 PEPP. L. REV. 743 (2000).

2. 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

3. 119 F.3d 148 (2d Cir. 1997).

remedy. Accordingly, we affirm the judgment of the district court.⁴

The Long Island railroad shooting was one of the most horrible and heinous crimes ever committed, and Ruger and Olin were both sued by the survivors of that terrible tragedy. But what I read is the law of New York, and I think ultimately we are going see the Second Circuit - if it is necessary to go to the Second Circuit - find that the action ought to be dismissed.

Now I would like to return for a moment to how we got to this litigation. After the 1994 elections, President Clinton made the following statement:

I still believe if you analyze those races race by race by race, the House of Representatives is in Republican hands today because we took on the Brady Bill and the assault weapons ban. And everybody knew they were unpopular. People said to me, don't do this, there's a reason no president has ever taken on this NRA; there's a reason for this.⁵

He was very bitter about the loss. I think he and the supporters of further gun control in this country learned a very valuable lesson. Whenever you are trying to prohibit or reduce the use of a product, you have two basic approaches. For example, in terms of a drug abuse strategy, you have a demand reduction strategy and a supply reduction strategy.

President Clinton learned very quickly that the demand reduction strategy was not working, and he and the anti-gun community paid a heavy political price for it. Therefore, from that point forward, the White House decided that they would reduce the means of supplying firearms in this country. They went after the gun industry, and they went after the industry on a regulatory basis. The anti-gun organizations also shifted their money from the legislative process into the litigation process.

Tactically, that was not a bad move on their part because they knew that they were going to have very little chance, as a matter of public policy, to convince the state legislators and the Congress to enact further demand reduction legislation. The result was obvious because gun ownership was actually increasing. Half the people in this country own a firearm.⁶ There are about 240 million firearms in this country, and ninety-eight percent of the firearms owned are used lawfully.

President Clinton, as Denise mentioned very briefly, applied the following supply reduction legislation: the 1994 crime bill required that sellers have a

4. *Id.* at 157 (emphasis added).

5. Interview of President Clinton at the Sperling Luncheon at the White House (Sept. 25, 1995).

6. See Robert J. Cottrol, *Submission is Not the Answer: Lethal Violence, Microcultures of Criminal Violence and the Right to Self-Defense*, 69 U. COLO. L. REV. 1029, 1039 n.26 (1998) (stating that "[t]he generally accepted figure is that roughly 50% of American households have firearms"); see also GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* 18 (1991) (same).

storefront operation.⁷ As result, the number of federal firearms licensees in the United States went from over 280,000 at its peak down to the present level of about 104,000.⁸ Consequently, gun sales went down substantially.⁹ Before that, President Clinton used his foreign policy authority to ban the importation of sporting firearms from China; he banned the importation of sporting firearms from Russia where there were substantial numbers coming into the United States.¹⁰ He even banned the importation of collector firearms like the M1 Grand¹¹ that was shown in the movie *Saving Private Ryan*.

The bottom line is that, at one point, we had firearms imports coming into the United States at a rate of several million guns per year.¹² It is now down to 800,000.¹³ So far, the President's supply reduction efforts are working. President Clinton has taken other measures to make it extremely costly to do business as a distributor, retailer, or even a manufacturer of firearms.

Moreover, some creative supporters in the Congress have actually come up with even better ideas. Guns, if properly made, and many of them are properly made because of historic products liability doctrines that have controlled their improvement over many years, are going to last a long time; many generations, as a matter of fact.¹⁴ However, you need ammunition for them to function. And ammunition is totally expendable. If there is no ammunition, the gun will not function. So Senator Daniel Patrick Moynihan (D-NY) and others have proposed, for example, that ammunition be taxed at a 200 or 300 percent level so it becomes

7. See BUREAU OF ALCOHOL, TOBACCO, & FIREARMS, U.S. DEP'T OF TREASURY, COMMERCE IN FIREARMS IN THE UNITED STATES 1 (2000) [hereinafter COMMERCE IN FIREARMS] (noting that "[i]n 1993 and 1994, Congress added several safeguards to ensure that only legitimate gun dealers obtain Federal licenses, including increased fees and certification requirements").

8. See *id.* (noting that "[t]he number of Federal firearm licenses dropped from 284,117 in 1992 to 103,942 in 1999").

9. See *id.* at 6 (observing that "[i]n recent years, [gun] sales have fallen back [to] . . . nearly 4-1/2 million annually-roughly the same level as in the mid-to-late 1980s").

10. See Michael K. Frisby & Christina Duff, *Clinton Moving to Bar Import Permits for Assault Guns Made for Sports Use*, WALL ST. J., Nov. 14, 1997, at B6; David Johnston, *Advocates of Gun Control Fear Results of a Trade Agreement with Russia*, N.Y. TIMES, Feb. 2, 1996, at D1.

11. See Robert Suro, *President Making Gun Import Ban Permanent Order will Cover Assault Weapons*, WASH. POST, Apr. 6, 1998, at A6.

12. See COMMERCE IN FIREARMS, *supra* note 7, at 5 (2000) (noting that the average number of firearms imported in 1992-94 was approximately 2.5 million per year).

13. See *id.* (reporting that approximately 892,000 firearms were imported in 1999).

14. See Scott Dailard, *The Role of Ammunition in a Balanced Program of Gun Control: A Critique of the Moynihan Bullet Bills*, 20 J. LEGIS. 19, 24 (1994) (stating that "handguns are all-too- durable goods capable of repeated use over many decades"); see also 139 CONG. REC. S16,931 (daily ed. Nov. 3, 1993) (statement of Sen. Moynihan) (asserting that "the life of a handgun seems to be measured in decades, generations and even centuries").

cost prohibitive to buy ammunition.¹⁵ The bottom line is that in making it very expensive, it becomes increasingly difficult for the industry to operate in this environment.

At the same time, I think there are some other considerations that have to be given with regard to why the suits have been brought. The supply reduction theories were working not on the legislative side, but on the regulatory side where the President could invoke his own individual authority either for foreign policy reasons or by directive through the Bureau of Alcohol, Tobacco, and Firearms. At that time, the strategy of the anti-gun movement was to shift funds into the litigation arena. *Hamilton v. Accu-Tek* was really the first large products liability suit against gun manufacturers, but it should be distinguished because it is a purely private action, and not brought on behalf of a municipality or other public entity.¹⁶

Unfortunately an alliance has arisen among three different actors, each having different motivations for getting involved in such litigation. The first group has to do with the plaintiff's bar and individual plaintiffs' lawyers, such as Jonathan Cole, who either missed out on the windfall from the tobacco litigation or saw another opportunity to generate an enormous amount of revenue regardless of what the public policy consequences might be or of the implications for tort law, or even for that matter, of the constitutional issues involved. It was simply a way to make a lot of money quickly.

The second group consists of mayors and other public officers. And what was their motivation? Some people like to speculate that the gun suits would be a good revenue source for them, but I do not think revenue has had a lot to do with it for this group. I think it is almost an irony that the municipal suits have been brought on the basis of trying to bring accountability to the industry, which I believe has always existed.

There are over 22,000 firearms laws in the United States. It is the most heavily regulated industry, I think, other than some exceptions like the nuclear industry, for instance. But the mayors had another motivation which was to divert accountability and responsibility from what was, and still is, going on in their jurisdictions, away from themselves. They have an individual responsibility for the public policies in their jurisdictions which may have been ineffective in controlling crime. They wanted to shift attention away from themselves to another party, and gun litigation presented a perfect opportunity for them because they saw the parallel to the tobacco litigation and thought, "Hey, this would be a good way for us to make

15. See THE REAL COST OF HANDGUN AMMUNITION ACT, S. 1616, 103d Cong. (1993) (seeking to tax specific deadly forms of ammunition at a rate that would make purchasing the ammunition prohibitively expensive). Senator Moynihan's proposal was formally introduced at 139 Cong. Rec. S14,958 (daily ed. Nov. 3, 1993). In the Senator's view, freeing the supply of ammunition would effectively put the guns that rely on such ammunition out of commission over the course of three to five years. See *id.*

16. The complaint in *Hamilton v. Accu-Tek* was filed by seven shooting victims that claimed negligent marketing and distribution by handgun manufacturers. See 62 F. Supp. 2d 802, 808 (E.D.N.Y. 1999).

a few dollars, but more importantly, try to put the focus and the attention on our inability to deal with public safety issues in our jurisdictions." Now, of course, they are not stating that, but that is the benefit, and I think, it is the primary intent behind their actions.

Finally, the third actor in this melodrama is the anti-gun groups. Their motivation is malice, but it is a different kind of malice. They are extraordinarily frustrated by the failure to move forward any of their gun control proposals in many state legislatures and Congress, the proper forum for this issue. Ultimately, their theories, which the legislators rejected, all come down to the same thing: we will reduce crime if we just simply eliminate all gun ownership or most gun ownership whether it is criminal or law abiding.

In fact, that theory is flawed, as is clearly shown in the criminology studies that have been done over many years. The best way to reduce crime is, for example, with a program like Project Exile that was started by an Assistant United States Attorney in Richmond, Virginia. There, they took the existing federal statutes for a felon in possession of a gun and prosecuted every felon who illegally possessed a firearm.¹⁷ An amazing thing happened. Gun-related crime in Richmond fell by about 80 percent in a two or three year period.¹⁸ They enforced the law. What a novel theory that is; they enforced the existing law and it worked.

In addition to these three actors coming together to cooperate in the litigation environment, something else has occurred recently as well. The Gun Industry Accountability Act is being introduced in Congress.¹⁹ Keep in mind that while all this litigation is being started or going on and where cases have not been resolved, or final judgment has not been entered, or as in Denise's case, not one cent has yet been paid, we have Senators Frank R. Lautenberg (D-NJ) and Byron L. Dorgan (D-ND), introducing the legislation I just mentioned.

The Gun Industry Accountability Act encourages suits to be brought by public entities, at a certain cost.²⁰ The proposed bill, if adopted, would let public entities bring suits and even plead in their complaint federal damages, such as federal

17. See Rob Zaleski, *NRA and Its Opponents Say Project Exile Works*, CAP. TIMES, Aug. 16, 1999, at 1D (noting that under Project Exile, individuals using firearms while committing a crime are tried under federal statutes that "carry mandatory sentences of at least five years without parole").

18. See Michael Janofsky, *Tougher Federal Penalties Await Gun Offenders in 'Project Exile'*, HOUS. CHRON., Feb. 10, 1999, at A13 (crediting Project Exile for helping reverse years of rising crime rates in Richmond).

19. Senator Frank Lautenberg, a Democrat from New Jersey, introduced the Gun Industry Accountability Act in Congress in an attempt to provide incentives for state and local governments to bring claims against the firearms industry. See 145 CONG. REC. S2412-02 (daily ed. Mar. 8, 1999) (statement of Sen. Lautenberg).

20. See *id.*

economic harm for Medicaid related gun-shot victim costs.²¹ The bill requires that the mayors do the work, keep two-thirds of the award, and submit the other one-third as the share of the United States government. Here is an example of where people are so excited in Congress who support the anti-gun movement that they are already proposing legislation to spend the money before it has even awarded by the courts!

I would like to take another look at an oversupply theory suit in Chicago involving a public entity because I think it is illustrative of what is going on aside from *Hamilton v. Accu-tek*. The suit in Chicago involves the city of Chicago's alleged evidence of gun shops selling to undercover police officers dressed in gang colors, and the record of conversions between shopkeepers and undercover police attempting to buy guns.²² Basically, the bottom line of this suit is that the plaintiffs are trying to demonstrate that gun shops in the city of Chicago and the suburbs are being used as a source of crime guns.²³

What they do not point out in the suit, however, is that the dealers involved are really faced with a no-win situation. I mentioned before that the gun business is a very, very heavily regulated business. Illinois is also, at the state level, a very heavily regulated jurisdiction.²⁴ So keep in mind the following scenario. Someone walks into a gun shop and they want to buy a gun. Let's say they are dressed in gang colors. In this situation, the supposed gang member meets all the state requirements by passing the criminal background checks and by signing the required forms promising to obey state and local laws. It is important to remember that every firearm transferred at the retail level in the United States requires an instant check on that buyer's criminal background or a special firearms permit.²⁵

In Illinois, the buyer comes in and meets all requirements for acquiring a gun which are fairly stringent. You need a firearms owner identification card plus you

21. The Gun Accountability Act of 1999 specifically provides that [i]n any civil action by a State or unit of local government against distribution, use or misuse of a firearm (including gun violence) in the State or unit of local government, the State or unit of local government may, in addition to other damages, recover any Federal damages associated with the claim.

Id.

22. See Fran Spielman, *Gun Dealers to be Indicted Suburban Shops Targeted by Police*, CHICAGO SUN-TIMES, Aug. 17, 1999, at 2 (reporting that the mayor of Chicago filed a \$433 million lawsuit against the gun industry, claiming it flooded the city with illegal guns, knowing they would be used to murder, rob, and terrorize the people of Chicago); Devon Spurgeon & Paul M. Barrett, *Into Thin Air: Operation Gunsmoke Touted as a Big Deal, Makes a Small Mark*, WALL ST. J., Apr. 6, 2000, at A1.

23. See Spielman, *supra* note 22, at 2.

24. See 430 ILL. COMP. STAT. 65/2 (West 1999) ("No person [in the State of Illinois] may acquire or possess any firearm . . . without having in his or her possession a Firearm Owner's Identification Card previously issued in his or her name by the Department of State Police.").

25. See 18 U.S.C. § 922(t)(1) (1999) (stating that "a licensed importer, licensed manufacturer, or licensed dealer shall not transfer a firearm to any other person who is not licensed . . . unless before the completion of the transfer, the licensee contacts the national instant criminal background check system").

have to go through the federal checks.²⁶ Yet their appearance is such that somehow the retailer is supposed to be on notice that they might be up to some sort of nefarious activity or that they might misuse the product eventually, and therefore, a decision refusing to sell should be made at that point with regard to that buyer.

Well, you know what? We have had those cases, haven't we? We have had young men and young women who have walked into retail establishments and somebody does not like their looks, and they say to them, "We are not going to sell you anything." And what happens? They get sued for discrimination. My point is that the oversupply theory is not a theory I think will be sustained.

The public believes that manufacturers should not be held liable or accountable for the misuse or criminal misuse of the product.²⁷ It is as simple as that. Some polls are as high as ninety percent and many of the statistically stratified polls are in the seventy percent range in support of the non-accountability of manufacturers of lawful products. And I believe and hope that the courts will stick with the historic torts doctrine, and will not impose liability upon product manufacturers and sellers. I believe that will be the ultimate result in *Hamilton v. Accu-Tek*, and that the actions pending across the country will be dismissed.

26. See 430 ILL. COMP. STAT. 65/2 (West 1999) (requiring all persons in Illinois to obtain a Firearm Owner's Identification Card prior to acquiring or possessing any firearm).

27. See Tom W. Smith, *Well Before Littleton*, WASH. POST, July 13, 1999, at A19 (noting that the public is not willing "to treat guns like tobacco and to hold their manufacturers liable for injuries that result from firearms").

